

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

CARYL QUASHIE, )  
 )  
Plaintiff, )  
v. ) CIVIL ACTION  
 ) FILE NO. 1:17-CV-03081-MLB  
 )  
OLYMPUS AMERICA, INC. ET AL, )  
 )  
Defendants. )  
\_\_\_\_\_ )

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BEFORE THE HONORABLE MICHAEL L. BROWN  
TRANSCRIPT OF PROCEEDINGS  
MAY 21, 2018  
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JANA B. COLTER, FAPR, RMR, CRR, CRC  
Realtime Systems Administrator  
Official Court Reporter  
1949 U.S. Courthouse  
75 Ted Turner Drive, SW  
Atlanta, Georgia 30303  
(404) 215-1456

1 APPEARANCES:

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3 For the Plaintiff:

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VIRGINIA ANELLO  
DIANA YASTROVSKAYA  
MICHAEL BRANDON SMITH  
Attorneys at Law

For the Defendant:

JACOB D. CHARLES  
JENNIFER R. BURBINE  
RICHARD C. BEAULIEU  
Attorneys at Law

1 (Atlanta, Fulton County, Georgia, May 21, 2018, in open  
2 court.)

3 - - -  
4 P R O C E E D I N G S  
5

6 THE COURT: Y'all can be seated. Give me just a  
7 second, though, to get organized.

8 Okay. Good afternoon, everyone.

9 MR. CHARLES: Good afternoon.

10 MS. ANELLO: Good afternoon.

11 THE COURT: We are here on the case of Quashie -- am  
12 I saying that right?

13 MS. ANELLO: Yes.

14 THE COURT: -- versus Olympus America, et al,  
15 17-CV-3081. Could I ask each of the parties to please announce  
16 themselves?

17 MS. ANELLO: Virginia Anello with Douglas & London on  
18 behalf of the plaintiff, Caryl Quashie.

19 MS. YASTROVSKAYA: Diana Yastrovskaya on behalf of  
20 the plaintiff, Caryl Quashie, Douglas & London also.

21 MR. SMITH: Brandon Smith, Your Honor, on behalf of  
22 Ms. Quashie from Childers, Schlueter & Smith here in Atlanta.

23 THE COURT: Hello.

24 MR. CHARLES: Good afternoon, Your Honor. Jacob  
25 Charles with McGuire Woods on behalf of the defendants.

1 MS. BURBINE: Your Honor, Jennifer Burbine, McGuire  
2 Woods, on behalf the defendants.

3 MR. BEAULIEU: Your Honor, Richard Beaulieu, also  
4 McGuire Woods, on behalf of defendants.

5 THE COURT: Thank you. Mr. Beaulieu, you're not  
6 related to Nick Beaulieu, are you, the doctor?

7 MR. BEAULIEU: No, unfortunately not.

8 THE COURT: No, okay. All right. So I have read two  
9 different sets of motions to dismiss. One on the  
10 jurisdictional grounds and one on the pleadings grounds. I  
11 have read all of the papers on those. I have also read a  
12 number of cases, some of which you-all cite, the *Brazil* case,  
13 there's another case called *Betancourt* and another case called  
14 *GenTran Corp*, but I have read those cases? And I will turn it  
15 over to the parties to begin. Do you all want to handle the  
16 personal jurisdiction issue first?

17 MR. CHARLES: I think that makes sense.

18 MS. ANELLO: It would make sense, expect for one  
19 thing. I feel that their shotgun pleadings argument kind of --  
20 their personal jurisdiction argument is dependent upon some of  
21 the other arguments they made with respect to the shotgun  
22 pleadings, and specifically you can't have more than one  
23 allegation against -- you can't have an allegation against more  
24 than one defendant's argument, and I think because that ties in  
25 there, there could be an argument with having that first, but

1 if the Court would like to do personal jurisdiction, I'm fine  
2 with that as well.

3 THE COURT: I think that probably makes sense. And  
4 I'll tell you my concern. My concern at the outset is that the  
5 plaintiff's complaint, I think there is complaint -- a  
6 complaint that can be drafted that satisfies jurisdiction  
7 against maybe all but certainly some of the defendants. And I  
8 think also it can satisfy the requirements for the various  
9 causes of action.

10 I am, however, concerned by while it might not be  
11 technically a shotgun pleading, I think you-all make a point  
12 that where the Eleventh Circuit says it's a shotgun pleading,  
13 it means that you alleged all of the facts cumulatively for  
14 each count, so that the final count is a summary of all prior  
15 allegations. So while it may not meet that definition of it,  
16 that by alleging defendants in the plural each time, that you  
17 do away with the need for specificity as to each defendant.

18 And if we were dealing with three different  
19 companies, one company that manufactured it, let's say, one  
20 company that was in charge of marketing it and one company that  
21 was in charge of training, let's say, and let's say they  
22 weren't all Olympus affiliates, I think it would be really hard  
23 if you were one of defendants to defend against the claim where  
24 they're all lumped in together. And so my concern is what the  
25 defendants say is that by alleging everyone each time, you do

1 away with the need for specificity as to any individual  
2 defendant and it makes it hard for me to assess jurisdictional  
3 elements when I can't tell what one defendant is alleged to  
4 have done versus another defendant. And so I'd like you to  
5 address that.

6 On the other hand, defendants could have maybe made  
7 this a tougher issue on the jurisdiction by putting forth an  
8 affidavit that challenged some of the allegations. And so we  
9 saw, for example, there were other cases against the Olympus  
10 Groups and we're talking about one case in particular in Texas  
11 where we see where they came in with an OMSC corporate  
12 representative giving an affidavit in which he challenged the  
13 idea that OMSC was availing itself of business in Texas. And  
14 in this case, the defendant didn't do that. And so maybe I  
15 have to accept the general defendants plural portion for the  
16 purposes of jurisdiction, because -- I'm almost done. I'm  
17 going to let you go in just a second.

18 Because it's hard for me otherwise to assess personal  
19 jurisdiction. But I think that becomes an impediment and a  
20 problem for the plaintiff when you get into the other motion to  
21 dismiss, because there is no specificity in that instance. I  
22 don't know who you claim had the duty. I don't know who you  
23 claim said what. And I don't think I have to credit as  
24 strongly the allegation that everybody did it. I think that  
25 under *Twombly*, I have to hold you to a higher level of

1 specificity, particularly on the fraud claims, and there's four  
2 of them.

3           So I'd like you-all to address that issue. Because  
4 the way I'm leaning to this, and I'm telling you this on the  
5 front end, is I'm leaning towards granting the motion to  
6 dismiss on jurisdictional issues, on jurisdictional claim  
7 subject to -- no, I'm sorry. Let me scratch that. My clerk is  
8 going to remind me that that's not what we were thinking. I'm  
9 considered denying the motion to dismiss on jurisdictional  
10 issues, although I have real concerns about jurisdiction over a  
11 Japanese parent without more evidence of them actually doing  
12 something in Georgia. But I'm considering that I have to  
13 accept the allegations and that they probably are enough in the  
14 absence of some affidavit that contradicts them.

15           But granting the motion to dismiss on the other  
16 pleading standards, subject to giving you an opportunity to  
17 amend. That's where I'm leaning. And so I'd like you-all to  
18 in your argument address the way I see it. And I think that  
19 the jurisdictional issue, the way I read the law and the way I  
20 read the *Brazil* case and other cases that it cites,  
21 particularly the *Betancourt* case, is that I probably have to  
22 accept those uncontradicted general allegations, but that I  
23 probably don't on the motion to dismiss for failure to state a  
24 claim side, okay?

25           So with that -- and I bring that up at the beginning,

1 Ms. Anello, because you sort of said that that general defense  
2 and their claim of a shotgun pleading somehow merges the two,  
3 and I do think it does. I think there is a common issue there.  
4 But I think it cuts against each of you on a different issue.  
5 So anyway, I'll turn it over to you.

6 MS. ANELLO: Oh, okay. I will be glad to argue  
7 first. It's defendants' motion. I don't if there's a  
8 preference. regarding the personal jurisdiction --

9 THE COURT: I'm sorry. I'm going to the  
10 jurisdictional issue. I'll let them go first, but you looked  
11 like you wanted to say something a minute ago.

12 MS. ANELLO: No. They can go first.

13 THE COURT: Okay.

14 MS. ANELLO: You probably said a lot of my argument  
15 with what you just said right now about personal jurisdiction.

16 THE COURT: Okay. Go ahead.

17 MR. CHARLES: Would you prefer if I come up to the  
18 podium?

19 THE COURT: Whatever makes you comfortable. You can  
20 stand, you can sit, you can come up, whatever makes you  
21 comfortable. I don't have a preference.

22 MR. CHARLES: I'll spread out here. Your Honor, I  
23 think you're correct that the issue on personal jurisdiction  
24 comes down to the fact that the plaintiffs have failed to  
25 distinguish between the entities, which is particularly



1 important here when there are two U.S.-based entities that have  
2 not objected to personal jurisdiction. There is Olympus  
3 America, Inc. and Olympus Corporation of the Americas, and  
4 there are two Japanese entities. And there are no specific  
5 allegations about what each individual entity has done.

6 And, Your Honor, we'd submit that the *Brazil* case  
7 actually supports the finding that when the complaint fails to  
8 ascribe particular conduct to any one defendant, in *Brazil*, it  
9 was J&J, that the Court said there that that means that they  
10 cannot satisfy their initial burden of proving minimum  
11 contacts. Similarly, Your Honor, the Supreme Court's  
12 jurisprudence in *Burger King* recognizes that this Court's  
13 inquiry under the personal jurisdiction analysis is to analyze  
14 each individual defendant's contacts with the foreign state.

15 Here, the main problem is this failure to distinguish  
16 among the defendants, the American entities, which do business  
17 in the U.S., and the foreign entities, the Japanese entities,  
18 but I would suggest, Your Honor, that it goes further than  
19 that. Not only is there a failure to distinguish among them,  
20 but there are no particularized allegations about conduct  
21 occurring in the State of Georgia, regardless of who's doing  
22 the actions.

23 Ms. Quashie wants this Court to accept legal  
24 conclusions and conclusory allegations about what happens in  
25 Georgia, which is not what this Court should accept. For

1 instance, Your Honor, courts in this district have rejected  
2 similar types of allegations that just restate the state  
3 long-arm statute. In *GenTran*, which Your Honor noted, for  
4 instance, the Court rejected as conclusory the allegation that,  
5 quote, defendant committed tortious acts that it knew or should  
6 have known would cause injury to plaintiff in this judicial  
7 district.

8 Similarly, another court in this district, in  
9 *Perrigo*, rejected the allegation that, quote, defendants may be  
10 found or transact affairs in this district. The kind of  
11 conclusory allegations in the complaint about what happened in  
12 Georgia, if anything, are insufficient to confer jurisdiction  
13 here.

14 Similarly, Your Honor, under the due process clause,  
15 the minimum contacts analysis requires an act of purposeful  
16 availment. There are no factual allegations that suggest that  
17 OMSC or Olympus Corporation, separate and distinct from each  
18 other and from the American entities, took any action within  
19 Georgia to purposely avail themselves of the benefits and  
20 protections of Georgia law.

21 THE COURT: What about, though, their allegation that  
22 both of those entities conducted and transacted business in  
23 Georgia and derived substantial revenue from products sold and  
24 used in Georgia?

25 MR. CHARLES: Your Honor, we would submit that those

1 are legal conclusions. The Eleventh Circuit in *Diamond*  
2 *Crystal*, when it explained what the prong one of the long-arm  
3 statute requires, says: We analyze all of the contacts, both  
4 the tangible and intangible contacts and then we determine  
5 whether that constitutes the transaction of business under  
6 Georgia law. So the transaction of business is a legal  
7 conclusion that is derived after viewing the allegations of the  
8 tangible and intangible contacts.

9 THE COURT: Well, that's what I'm trying to do. I'm  
10 trying to get the facts from which you could decide whether or  
11 not there's transacting business in Georgia. And I'm not sure  
12 that -- I'm not sure either of you has really given me enough.

13 MR. CHARLES: Yes.

14 THE COURT: And I'm afraid that that means -- I'm not  
15 afraid. I think that that means I have to just accept the  
16 allegation. Why do I then have to accept it?

17 MR. CHARLES: Your Honor, you don't have to accept it  
18 because -- for the personal jurisdiction inquiry, you only have  
19 to accept well-pleaded, factual allegations, not conclusions,  
20 such as did they transact business or derive substantial  
21 revenue.

22 Your Honor, as you recognized, OMSC and Olympus  
23 Corporation did not submit an affidavit, but that's because the  
24 burden never shifted under the second prong of the  
25 jurisdictional inquiry. Under the first prong, Ms. Quashie had

1 the burden, this is what the Eleventh Circuit said in *Mazer*,  
2 the burden to plead, quote, sufficient facts to establish a  
3 prima facie case. So to the extent this Court is concerned  
4 that there aren't sufficient facts, that's because we submit  
5 the plaintiff hasn't plead a prima facie case.

6 For instance, if there would have been allegations  
7 that OMSC or Olympus Corporation had engaged in a contract with  
8 Emory Johns Creek Hospital to sell this Q180V scope or that  
9 they had shipped the scope directly to Georgia, those would be  
10 factual allegations that could be rebutted by an affidavit.

11 THE COURT: Right.

12 MR. CHARLES: There aren't those kind of allegations  
13 here. OMSC and Olympus Corporation would be hard-pressed to  
14 craft an affidavit to rebut legal conclusions and conclusory  
15 allegations.

16 THE COURT: Give me a second to look at the Dixie  
17 Crystal case. I hadn't seen that one.

18 MR. CHARLES: *Diamond Crystal*.

19 THE COURT: I'm sorry, *Diamond Crystal*.

20 MR. CHARLES: It's an Eleventh Circuit case.

21 THE COURT: Right. I've got it up now. Just give me  
22 a second to find that portion. Yeah, see --

23 MR. CHARLES: It's Page 1264 of that opinion,  
24 Your Honor.

25 THE COURT: It's 1264? Okay. I'm on 1263. I'm just

1 trying to get to the part you cited. We examine all the  
2 nonresidents' tangible and intangible conduct and ask whether  
3 it can be fairly said that the nonresident has transacted any  
4 business in Georgia. That's what you're referring to?

5 MR. CHARLES: That's right, Your Honor. That's the  
6 legal conclusion, the outcome of the analysis.

7 THE COURT: Right. But, see, in that case, though,  
8 the defendant filed an affidavit in which they challenged the  
9 bald allegation, right?

10 MR. CHARLES: I'm not confident that it was just a  
11 bald allegation there.

12 THE COURT: And you're right. I don't know whether  
13 it was just a bald allegation or not. But they sort of put at  
14 issue that. And I also looked at the one case that's got --  
15 one of the clients is something called Bospart Holland. Do you  
16 know this case?

17 MR. CHARLES: I don't believe I'm familiar with that,  
18 Your Honor.

19 THE COURT: I don't know which case that comes from.  
20 I'll tell you if I find it. I know the civil action number is  
21 15-CV-222. I don't think it's a Georgia case, though. I think  
22 it's -- maybe it is a Georgia case. But here, there was just  
23 an allegation that they had engaged in business within the  
24 jurisdiction.

25 MR. CHARLES: Um-hmm.

1 THE COURT: And they challenged that, just like they  
2 did in the *Brazil* case. But in the *Brazil* case, *J&J*, there was  
3 an allegation that they were all of them, it was sort of like  
4 here.

5 MR. CHARLES: Yes.

6 THE COURT: A shotgun allegation that all of the  
7 defendants were engaged in -- the same thing they say here,  
8 everything, marketing, manufacturing, researching and  
9 developing, all of that, which we know probably no company does  
10 all of that.

11 MR. CHARLES: Right.

12 THE COURT: Or at least in a situation like this,  
13 they don't all do all of that.

14 MR. CHARLES: Right.

15 THE COURT: But *J&J* came forward with an affidavit  
16 that said we're just a holding company and we don't do any of  
17 those things. And then the court held that that rebutted it,  
18 that shifted the burden to the plaintiff, and the plaintiff was  
19 not capable of coming forward with their own evidence from  
20 which a judge could look at it and could make an assessment of  
21 due process or the long-arm statute.

22 Here, if you look at their complaint, and you say,  
23 for example, they allege that these two defendants designed,  
24 researched, tested, manufactured, promoted these scopes, and in  
25 particular the scope at issue, into the stream of commerce, and

1 that they then transacted business in the State of Georgia, if  
2 that's true, and that they derived substantial income --

3 MR. CHARLES: Yes.

4 THE COURT: -- if that's true, they probably satisfy  
5 the third prong, if you add into it the fact that the plaintiff  
6 was injured.

7 MR. CHARLES: Yes.

8 THE COURT: The third part of the long-arm statute,  
9 Section 3. And they probably also satisfy due process. My  
10 guess is, is that your client would say we didn't do those  
11 things.

12 MR. CHARLES: Yes, sir.

13 THE COURT: But I can't reach that yet.

14 MR. CHARLES: So two points in response, Your Honor.  
15 One I would say, again, I think those are legal conclusions,  
16 and, in particular, the deriving substantial revenue.

17 THE COURT: Sure.

18 MR. CHARLES: What normally happens is there is  
19 factual allegations about how much revenue somebody did.

20 THE COURT: Right.

21 MR. CHARLES: And then the court would decide is that  
22 substantial revenue.

23 THE COURT: Yes.

24 MR. CHARLES: So a bald statement that they derived  
25 substantial revenue is not sufficient. And, secondly, I would

1 just suggest that even if it satisfies the long-arm statute,  
2 the due process analysis is different. This is what the  
3 Georgia Supreme Court said in *Innovative Clinical* and what the  
4 Eleventh Circuit reiterated in *Diamond Crystal*, and that  
5 requires purposeful availment.

6 I do not think that if there was an allegation that  
7 this Court did accept as true that one of these entities or  
8 both of these entities derived substantial revenue from sales  
9 in Georgia that would satisfy the due process clause, because  
10 the revenue -- there would be no relationship between what that  
11 revenue was derived from and the claims at issue in this case.  
12 It could be the case from this allegation, Your Honor, that  
13 they derived substantial revenue from other medical products  
14 that they sold in this state and the due process analysis  
15 requires the relationship to the claims at issue here.

16 THE COURT: So if they were to show that they  
17 transacted business in the State of Georgia, would that be  
18 enough to satisfy due process?

19 MR. CHARLES: It would not, Your Honor. The -- a  
20 case that the plaintiffs cite in their opposition brief, the  
21 case from the Southern District of Georgia, and I'm forgetting  
22 exactly the name of it.

23 THE COURT: Yeah. You address it in a footnote, I  
24 think.

25 MR. CHARLES: Yes, that's right.



1 THE COURT: I know what you're talking about.

2 MR. CHARLES: I think the sale from a company up  
3 north into Georgia, the district court there found that  
4 satisfies the transacting business because they sold it to a  
5 plaintiff in Georgia, shipped it directly to Georgia, but it  
6 did not satisfy the due process clause, because there was no  
7 showing there, no factual allegation there to suggest the  
8 defendant purposely availed themselves. It just so happened  
9 that the plaintiff had resided in Georgia and the defendant  
10 shipped it there. The due process analysis is different for  
11 that reason, because the Georgia Supreme Court has said that  
12 the long-arm statute could be read to reach farther so that  
13 should be limited by the due process clause.

14 And, Your Honor, the Supreme Court's recent state of  
15 jurisprudence on personal jurisdiction suggests that each  
16 individual defendant's conduct needs to be analyzed separately,  
17 that allegations like this, that each and every defendant did  
18 actions without describing them with particularity is  
19 insufficient to confer jurisdiction, particularly over two  
20 foreign corporations.

21 THE COURT: Unless they each actually did design,  
22 research, test, manufacture, promote, sell, et cetera,  
23 et cetera, et cetera.

24 MR. CHARLES: Yes.

25 THE COURT: Right. So if they both did those

1 things --

2 MR. CHARLES: If all four of them did those things.

3 THE COURT: The two that are at issue here.

4 MR. CHARLES: Yes.

5 THE COURT: If those two did those things, then it  
6 would be okay for them to plead them the same. And I think  
7 what you say is commonsensible, and that's why I say that I  
8 have concerns over the jurisdictional issue. And more so over  
9 on the due process side, because I do think that there is --  
10 well, maybe it's over both of them. I have some concerns about  
11 those. I'm just afraid that -- I don't have a case that says  
12 these broad allegations unchallenged by a defendant are  
13 nonetheless insufficient, right?

14 I think that that's what the case says on the issue  
15 of the 12(b)(6). But on the jurisdictional issue, I don't have  
16 one that says these types of overly broad allegations are  
17 insufficient. Because I think the way it's meant to work is  
18 plaintiff's can allege broadly, defendants can decide whether  
19 they're challenging jurisdiction, and if they are going to,  
20 they file something that challenges it that says no, we don't  
21 do this, that and the other thing. And that puts it at issue.  
22 Here's our evidence and then they have to come forward with  
23 specific things from which a real analysis can be done.

24 But in the absence of a challenge to the factual  
25 allegation at a motion to dismiss stage, I don't see a case

1 that says I can go beyond the pleadings and say well, they  
2 don't really do these things. Do you see what I mean?

3 MR. CHARLES: Yeah. Yes, Your Honor. I take your  
4 point. And I think what *Mazer*, the Eleventh Circuit said in  
5 *Mazer* and *Future Technology* that the way the burden shifting  
6 framework is supposed to work is that the plaintiff has the  
7 initial burden to plead a prima facie case and that requires  
8 factual allegations that are sufficient to shift the burden.  
9 So we suggest that the burden never shifted in this case for  
10 the defendant to put it at issue, because there are no factual  
11 allegations to rebut. Your Honor's cites, that the string  
12 citation in the plaintiff's complaint that all of the entities  
13 did manufacturing and designing, that alone would not be  
14 sufficient. That's just conduct that they would engage in.

15 The allegation that I think this Court -- that come  
16 most closely to alleging jurisdiction are the allegations that,  
17 for instance, they transact business or they derive substantial  
18 revenue, but again, we would suggest that those are not factual  
19 allegations, those are legal conclusions. And the courts in  
20 this district in *GenTran* and *Perrigo* have rejected very similar  
21 allegations that are just conclusory and said we don't rely on  
22 those to see if the plaintiff has established a prima facie  
23 case.

24 And in *GenTran*, for instance, Your Honor, there was  
25 an allegation both that the -- that the parent company and two

1 of its subsidiaries were subject to personal jurisdiction in  
2 the State of Georgia. The Court looked at the parent company  
3 and said this is not a prima facie case. It didn't even  
4 analyze any affidavit or rebuttal evidence and was dismissed  
5 there without allowing for any kind of further inquiry.

6 As to the subsidiary, it said there was sufficient  
7 allegations that there alter ego and the court allowed further  
8 inquiry there. I think the same should still hold true here.  
9 To the extent Your Honor is concerned about a lack of factual  
10 allegations, that is plaintiff's failure to meet her prima  
11 facie case under step one of the jurisdictional.

12 THE COURT: Let me just read *GenTran* again.

13 MR. CHARLES: This is in Footnote 3 where the Court  
14 rejects that conclusory allegation.

15 THE COURT: Okay. I'll look at this case some more.  
16 I mean, my concern -- I see what you're saying. The  
17 allegations in it seem to be -- they abandon B and C.

18 MR. CHARLES: Right.

19 THE COURT: Let me look at the one where she goes and  
20 Judge Martin says B and C wouldn't be enough anyways.

21 MR. CHARLES: Yes.

22 THE COURT: Okay. It says B is a legal conclusion,  
23 that is, it committed tortious acts. And then C, it says is  
24 not okay because of *the Asahi Metals* case. So what that would  
25 mean is that I would have to look at, just by way of example,

1 the allegations in Paragraphs 38, 39, 40 and 41 and 42, and see  
2 whether those allegations, if true, would satisfy jurisdiction.

3 MR. CHARLES: I think what the court says in Footnote  
4 3 is that the allegation in Subparagraph B there was a legal  
5 conclusion that it does not consider as true to support the  
6 jurisdiction.

7 THE COURT: But that's because the allegation there  
8 was that it committed tortious acts that it knew would cause  
9 injury in the judicial district. That's not what they're  
10 alleging here. Here they're alleging that --

11 MR. CHARLES: Right.

12 THE COURT: -- they designed, researched, tested,  
13 manufactured, marketed, promoted and sold the scope into the  
14 stream of commerce.

15 MR. CHARLES: Then I would suggest that there is --  
16 there's not a jurisdictional basis under 38, if the Court  
17 accepted that as true.

18 THE COURT: Well, you've got to read them all  
19 together.

20 MR. CHARLES: Okay.

21 THE COURT: So then you would say -- it was curious  
22 to me that they didn't say including into Georgia, but  
23 that's -- then the next one, that they conducted business in  
24 Georgia, that they derived substantial revenue from goods and  
25 products used in Georgia, and they should have expected

1 consequences from their acts and the revenue they obtained in  
2 Georgia. Right? And would that be enough. And you say it  
3 would not because they didn't link the alleged malfeasance in  
4 this case to the conduct or to the revenue they got in Georgia.

5 MR. CHARLES: Yes.

6 THE COURT: Okay.

7 MR. CHARLES: Yeah.

8 THE COURT: I see that point. And I don't -- I might  
9 have to look at that a little harder. But the other part of  
10 the *GenTran* case is, again, it falls into what I was noting,  
11 which is that the defendant came forward and said we're a  
12 holding company that never advertised, marketed, distributed or  
13 delivered products to anyone, much less consumers in Georgia.

14 MR. CHARLES: Yes.

15 THE COURT: And your client could have come forward  
16 and said we never designed, researched, tested, manufactured,  
17 anything or put anything in the stream of commerce or  
18 transacted business in Georgia or derived substantial revenue  
19 from items in Georgia. And I saw that that's essentially what  
20 they did in the Texas case. And then that would sort of front  
21 the issue of well, what did they do. Do you see what I mean?

22 MR. CHARLES: Yes, Your Honor.

23 THE COURT: Because it could be -- and maybe that's  
24 it, maybe I will just -- it may be what you're telling me is  
25 that even if you accept these allegations as true, and I don't

1 find them to be legal conclusions, that they are not enough to  
2 support jurisdiction.

3 MR. CHARLES: Yes. They would support long-arm  
4 jurisdiction if the Court accepted them as true, but they would  
5 not satisfy the due process clause. And I think that a case  
6 here that's helpful is a case in this district *McCarthy v.*  
7 *Yamaha Corporation*. That is a case where there was an in-state  
8 manufacturer of a wave runner that injured a plaintiff and the  
9 plaintiff sued not only the in-state manufacturer, but its  
10 indirect parent company in Japan. And the Court said even if  
11 it's true that the Japanese entity designed the subject wave  
12 runner, bought it from the in-state entity and controlled --  
13 and was the parent company of the in-state entity, that's not  
14 enough under the due process clause to show that the Japanese  
15 entity purposely availed itself by directing its activities in  
16 the State of Georgia.

17 THE COURT: Okay. I think I understand. I mean,  
18 this has been helpful to me in that it's maybe focused me on  
19 one part away from my belief that in the absence of an  
20 affidavit, it's probably enough. I mean, maybe I've got to go  
21 back and look at whether if you accept these things, you meet  
22 due process.

23 I think that if you accept these things, you meet the  
24 long-arm statute, because I think they were focusing on the  
25 long-arm statute, particularly Section 3, I think it is.

1 MR. CHARLES: And Section 1 as well.

2 THE COURT: Section 1, as well. That's the  
3 transacting business?

4 MR. CHARLES: That's right.

5 THE COURT: And the second one I thought was deriving  
6 substantial revenue.

7 MR. CHARLES: That's the third.

8 THE COURT: Yeah. I'm sorry. The third. Yeah,  
9 okay. Give me one more second.

10 MR. CHARLES: Yes, Your Honor.

11 THE COURT: So you would say that the allegation of  
12 transacting business in Georgia and deriving substantial  
13 revenue from Georgia, from goods and products used in Georgia,  
14 is not enough to show that they purposefully availed themselves  
15 to the forum and therefore, must stand in the forum.

16 MR. CHARLES: Yes, Your Honor, for instance, they  
17 could have come to Georgia and transacted business on a wholly  
18 separate product and that wouldn't meet the due process  
19 analysis, even though it would satisfy the long-arm statute.

20 THE COURT: I see that. I mean, it is -- there's a  
21 case I read in some of this that addressed that issue  
22 specifically, it could be that they did a lot of other things  
23 in Georgia that made them money, but here, they don't say  
24 transacted business and derived money and that that was the  
25 scope. And I would assume that Olympus sells a whole lot of



1 other goods.

2 MR. CHARLES: That's correct, Your Honor.

3 THE COURT: I don't know if they still sell cameras,  
4 they did at one time, but I would assume that they sell a lot  
5 of other goods in Georgia, make lots of money off of them, and  
6 this scope is just one of them. That's your point?

7 MR. CHARLES: That's my point. And my point as well  
8 is that the Japanese entities are distinct and the American  
9 entities are the ones that there's been no challenge to  
10 personal jurisdiction.

11 THE COURT: Right. No, I get it. But, see, what  
12 you're doing there is you're trying to say that there are other  
13 reasons to doubt it.

14 MR. CHARLES: Yes.

15 THE COURT: But I thought we agreed --

16 MR. CHARLES: If you accept it.

17 THE COURT: -- if you accept it, because guys haven't  
18 challenged it.

19 MR. CHARLES: Yes.

20 THE COURT: And then the next question is should I  
21 give them time to conduct jurisdictional discovery?

22 MR. CHARLES: I think the answer to that is no for  
23 two reasons. One, they haven't asked for jurisdictional  
24 discovery.

25 THE COURT: Yeah, right.

1 MR. CHARLES: And the case law here points to the  
2 lack of diligence and the reason to deny jurisdictional  
3 discovery. For instance, in *Mazer*, the court affirmed the  
4 district court's refusal to allow jurisdictional discovery on  
5 those grounds. The same thing in the *GenTran* case, Your Honor,  
6 as to the parent entity.

7 And the second reason, Your Honor, is because, at  
8 least it's our contention they haven't met their prima facie  
9 burden, and without that, there's no reason for jurisdictional  
10 discovery. It would be useful in an instance where there was  
11 an affidavit and they would have to probe the factuality or the  
12 factual statements made in the affidavit, that's when the Court  
13 would allow jurisdictional discovery, when they haven't even  
14 alleged facts to hold these entities subject to the personal  
15 jurisdiction, they're probably subject to this Court's personal  
16 jurisdiction, we'd submit that jurisdictional discovery would  
17 be inappropriate, Your Honor.

18 THE COURT: Okay. Thank you. Anything else you want  
19 to say?

20 MR. CHARLES: Thank you. Not at this time,  
21 Your Honor.

22 THE COURT: Okay. Thank you.

23 Ms. Anello?

24 MS. ANELLO: Yes, Your Honor. You don't mind if I  
25 sit here? Everything is just spread out in front of me.

1 THE COURT: That's fine with me.

2 MS. ANELLO: Just I'd also like to point out that  
3 Paragraph 8 is also a jurisdictional allegation and it does  
4 talk about deriving substantial revenue from goods used in  
5 Georgia, including the Q180V scope and other similar duodenum  
6 scopes, so there are allegations about deriving substantial  
7 revenue from duodenum scopes and the Q180V scope at issue in  
8 this case. There's also an allegation that they sold -- that  
9 the foreign defendant sold this particular Q180V scope to the  
10 hospital at issue in this case.

11 I agree, I think with everything that's been  
12 discussed, I'm definitely going off of my outline, but I  
13 definitely agree that the legal standard --

14 THE COURT: Would you hang for one second?

15 Mr. Charles, I'm going to ask you to address that  
16 when she's done, okay?

17 MR. CHARLES: Sounds good, Your Honor.

18 MS. ANELLO: Okay. I just definitely agree that the  
19 legal standard is not what was presented by the defendants  
20 because they have not produced an affidavit or there's not been  
21 an evidentiary hearing regarding the jurisdictional issue. And  
22 so the real issue, the real standard is whether the plaintiff  
23 has -- has alleged sufficient -- has made sufficient  
24 allegations in order to support a reasonable inference that  
25 there is personal jurisdiction and we submit that it has been

1 done here through the various paragraphs set forth in the  
2 complaint that were identified and discussed today.

3 I would also just like to, you know, call the Court's  
4 attention to the *Black Box* case, which just talks about the  
5 standard of what you should look at when there is -- when no  
6 evidence has been submitted. And just motions to dismiss for  
7 lack of personal jurisdiction should be treated with caution.  
8 And, again, it sets forth the standard that only if the  
9 plaintiff has failed to allege sufficient facts to support a  
10 reasonable inference that defendant can be subjected to this  
11 jurisdiction.

12 THE COURT: So you believe that Paragraphs 38, 39,  
13 40, 41, if you also add Paragraph 8, are enough to satisfy due  
14 process, specific jurisdiction?

15 MS. ANELLO: Oh, I do. I believe 38 through 42  
16 without 8 is sufficient to satisfy due process, because the  
17 minimum contacts and all of the various allegations throughout  
18 the complaint regarding the foreign defendants' activities in  
19 selling -- and I know they do it all, they do. They're  
20 involved in every aspect of something that's alleged in that  
21 statement.

22 I'm -- and in the alternative, God forbid, if this  
23 should actually -- if the jurisdictional discovery is  
24 necessary, I'm not against it, because we know what the  
25 jurisdictional discovery will show. That's why the defendants

1 are against it. It will show those allegations are valid, but  
2 regardless --

3 THE COURT: I don't think they're against it. You  
4 all have never asked for it. And that's what he's saying.  
5 He's not saying we don't want to -- he's saying you guys have  
6 never asked for it.

7 MS. ANELLO: That's because we believe our complaint  
8 is sufficient on its face to allege personal jurisdiction. If  
9 that's -- they haven't submitted any evidence or anything else  
10 to go to an evidentiary hearing, but we stand by our complaint  
11 and don't think it's necessary. I was just responding to the  
12 last question that the Court asked that said do you believe  
13 that jurisdictional discovery is necessary. No, I don't. I  
14 think our pleadings are satisfied on all standards, including  
15 due process, but if it's a last-ditch effort, last alternative,  
16 I'm pretty confident what the discovery will show.

17 THE COURT: Okay.

18 MS. ANELLO: To be honest, Your Honor, my outline  
19 basically goes through a lot of the stuff that's in my brief  
20 that apparently you've already read. Do you still want me to  
21 go through that? Is there something particular to address?

22 THE COURT: I'm trying to see if I have questions for  
23 you about those allegations being sufficient. I mean, I'm not  
24 sure that 8 adds much, because it says we derive -- you derive  
25 goods in Georgia, including the scope and other similar scopes

1 and metal equipment -- medical equipment. And so it's sort  
2 of -- again, you're not there suggesting that there was  
3 sufficient revenue in Georgia from the sale of this scope at  
4 issue. You're really saying that it could have -- this was, as  
5 Mr. Charles was saying, that this was sort of a basket of goods  
6 that led to significant revenue. And I'm just wondering  
7 whether that is enough.

8 MS. ANELLO: Your Honor, throughout the complaint,  
9 the allegations, just in general, about their manufacturing and  
10 getting their product to the United States for use by hospitals  
11 and physicians, including within the State of Georgia as having  
12 the allegations there, and that they sold -- that they were  
13 responsible for selling this scope to the plaintiff and the  
14 hospital -- or that they were responsible for the scope used in  
15 the procedure, coupled with all of the other allegations, I  
16 think it's clear that they did derive substantial revenue from  
17 the scopes.

18 And especially including their factual allegations,  
19 36 also supports, at least with the Japanese corporation, that  
20 they have approximately 7 percent of the global market for  
21 gastrointestinal endoscopes and produces 85 percent of them in  
22 the United States. I think that also supports, as do the other  
23 allegations set forth in the complaint. But there was  
24 something further under the factual allegations section.

25 THE COURT: All right. So let me read you, do you

1 have the *Brazil* case in front of you?

2 MS. ANELLO: I had it. They're -- I believe there  
3 were two *Brazil* cases. I have the July 2016 case.

4 THE COURT: That's the one I have.

5 MS. ANELLO: Okay.

6 THE COURT: So let me just first ask you: Do you  
7 think that your allegations are enough to provide general  
8 jurisdiction under the due process clause or are we talking  
9 about specific jurisdiction?

10 MS. ANELLO: We're dealing with specific  
11 jurisdiction.

12 THE COURT: Okay. So if I look at specific  
13 jurisdiction, it says: Fair warning requirement is satisfied  
14 if the defendant has personally directed his activities at  
15 residents of the forum and the litigation results from the  
16 alleged injuries that arise out of or related to those  
17 activities. Okay?

18 MS. ANELLO: I'm sorry, what were you reading?

19 THE COURT: I'm reading on page -- the end of  
20 Page 1334 of the *Brazil* case under the part -- the Title 2,  
21 period, specific jurisdiction.

22 MS. ANELLO: I apologize. I must have the wrong  
23 page. I have July 2016, but I don't have anything with -- I  
24 begin at 1351.

25 THE COURT: No, I meant March 2016. I'm sorry. Do

1 you have that one?

2 MS. ANELLO: Yes. 13 --

3 THE COURT: If you have the Westlaw printout, it's  
4 probably Page 14.

5 MS. ANELLO: No, we're a Lexus firm. Sorry about  
6 that.

7 THE COURT: Look at the line that is at Headnote 14.  
8 Do you see that?

9 MS. ANELLO: Okay. Yes.

10 THE COURT: Okay. But definitely the defendant must  
11 purposefully avail itself of the privilege of conducting  
12 business, that is purposefully establishing contacts in the  
13 forum state and a sufficient nexus between those contacts and  
14 the litigation. Plaintiff relies on a stream of commerce  
15 theory, which I think is what you-all rely on, because you  
16 simply say if I look at those paragraphs, you say you put it  
17 into the stream of commerce, okay?

18 Then you say that you get business in Georgia and  
19 substantial revenue. I'm not sure you've even alleged -- I'm  
20 not sure that these allegations don't really sound general  
21 jurisdictiony more than specific jurisdictiony. But let me go  
22 back to that case. Because there you have to allege a nexus.  
23 I don't see where you have alleged a nexus between these scopes  
24 or the substantial business and the injury.

25 MS. ANELLO: Oh, I think that takes up half of all



1 the complaints, a substantial nexus between the scopes, you  
2 have Paragraph 8 discussing their substantial revenue from the  
3 goods in Georgia, including the scope and other similar  
4 Duodenoscopes which they manufacture, market, distribute and  
5 sold. They sold one of these scopes to the hospital at issue.  
6 These defendants were aware of the defects in the scope, yet  
7 failed to do anything about it and continued to sell it and it  
8 was used in Ms. Quashie's surgery and has caused her injury.  
9 The sales of the Duodenoscope --

10 THE COURT: Let's go back to this, because I'm going  
11 to try to address that issue. If we go back to the case, you  
12 know they talk about the *Nicastro* case, the plurality found  
13 that these alleged contacts with the forum state, including the  
14 sale of the one that caused the plaintiff's injury, did not  
15 establish the defendant engaged in conduct purposely directed  
16 at New Jersey to confer specific jurisdiction under the due  
17 process clause. Applying *Nicastro*, the district court at  
18 *Webster* concluded first the jurisdiction was not permitted when  
19 plaintiff has not alleged facts such as the volume of their  
20 sales in Georgia or direct advertising of their products in  
21 Georgia to suggest that ASI has purposely availed itself of the  
22 benefit of Georgia laws. Here plaintiff has not alleged any  
23 fact that Defendant J&J purposely availed itself to the benefit  
24 of Georgia law.

25 MS. ANELLO: Right. I'm sorry, can you repeat the

1 question? I'm with you now.

2 THE COURT: I'm just trying to say that I'm not sure,  
3 and I'd like you to point me to your best case, that alleging  
4 you sold a lot of scopes into the stream of commerce, that you  
5 transacted business in Georgia and that you derived substantial  
6 revenue from goods sold in Georgia and that the scope, this  
7 type of scope was amongst the things that generated a  
8 substantial amount of revenue.

9 MS. ANELLO: I do say again in Paragraph 8 that this  
10 scope was amongst the other medical equipment and other scopes  
11 that generated the substantial revenue from goods used in  
12 Georgia. That's in Paragraph 8.

13 THE COURT: Yeah.

14 MS. ANELLO: The only thing in front of me -- I know  
15 this is a lot and you're talking about specific jurisdiction,  
16 again, those cases are dealing with a different legal standard,  
17 because even in *Webster*, they had produced an affidavit saying  
18 they don't have any sales. And the Court wanted some more  
19 specificity regarding volume of ASI sales, but was only  
20 provided examples. We talk about they were advertising in the  
21 State of Georgia in Paragraph 38.

22 THE COURT: Where do you say that?

23 MS. ANELLO: 38, advertising, marketing, promoting,  
24 selling and distributing medical equipment into the stream  
25 of -- into the stream of commerce used by the public, including

1 the plaintiff, and going on to the State of Georgia afterwards.  
2 And then also referring -- again, I guess it's Paragraph 8 and  
3 9, it's in a count, but that every time they created and  
4 sold -- that each and every defendant here responsible for the  
5 Q180V scope used in the procedure on Ms. Quashie.

6 THE COURT: Yeah, but what if the scope was sold to  
7 the hospital, a hospital bought it, a hospital group bought it,  
8 McKesson bought it in Texas, right, and they send it to  
9 Georgia. All right. That would be no contact to Georgia.

10 MS. ANELLO: But I think here based on the  
11 allegations, that's different. We're saying they're selling  
12 and distributing it directly to the State of Georgia, to the  
13 hospital.

14 THE COURT: Where do you say that this scope was sold  
15 in the State of Georgia?

16 MS. ANELLO: This particular scope?

17 THE COURT: Yes.

18 MS. ANELLO: 89. And that it was used in the ER  
19 procedure performed on Plaintiff Quashie and then you go back  
20 to the allegations that everything took place with Ms. Quashie  
21 in the State of Georgia.

22 THE COURT: Yeah, but that just means it was used in  
23 the State of Georgia.

24 MS. ANELLO: You said sold.

25 THE COURT: Yes. Where do you have an allegation

1 that this defendant sold it into Georgia? Because this -- your  
2 case is consistent with them selling it outside of the State of  
3 Georgia and then the buyer bringing it into Georgia.

4 MS. ANELLO: I will stand by the complaint and all  
5 the allegations regarding personal jurisdiction read together  
6 to support the allegations against the defendants that this  
7 product, as well as other duodenum scopes, were sold within the  
8 State of Georgia, such that they should have expected the  
9 consequences to flow in Georgia. That's why they haven't  
10 produced any evidence, because they know the evidence supports  
11 that.

12 THE COURT: Well, I don't know -- I can't assume  
13 that, that's obviously not something I can assume. If I were  
14 going to try to do that, I would look at the OMSC corporate  
15 representative's affidavit in the Texas case, which says things  
16 like they're not registered to do business in Texas; they do  
17 not do testing in Texas; they do not sell any product in Texas,  
18 or provide, repair and maintenance service in Texas; they don't  
19 advertise in Texas; they do not contact Texas healthcare  
20 providers for manufacturing service, sales or marketing of  
21 medical equipment. And that none of their websites that are  
22 available -- that are accessible in Texas provide any goods or  
23 services. So, I mean, I don't know -- I can't assume that at  
24 all, because, first of all, I can't, it's not in evidence, and  
25 it just would not be fair.

1 MS. ANELLO: No. I mean, I understand that. I'm  
2 just saying I believe what's in the complaint, every allegation  
3 in here, and we've discussed them, again, with two and  
4 primarily the ones in the party defendants' section as well as  
5 the factual allegations regarding what they do with the scope  
6 and in selling it all supports that they had -- that minimum --  
7 the due process aspect of the personal jurisdiction analysis is  
8 satisfied.

9 THE COURT: Um-hmm.

10 MS. ANELLO: If you look at Paragraph 80, it's just  
11 another example of an allegation where we discuss that they  
12 have been promoting and advertising and selling their products  
13 specifically to consumers, not simply that it was used but that  
14 they were selling it to consumers, which included the  
15 plaintiff, Caryl Quashie, and she's in Georgia.

16 THE COURT: Where is this? Which one?

17 MS. ANELLO: Paragraph 80.

18 THE COURT: 80? They sold their scopes to consumers;  
19 is that right?

20 MS. ANELLO: Right. Well, no. The consumers and  
21 their healthcare physicians.

22 THE COURT: The consumers are healthcare physicians?

23 MS. ANELLO: Healthcare physicians.

24 THE COURT: Which Ms. Quashie is not a healthcare --

25 MS. ANELLO: No.

1 THE COURT: Let me just read something. Does anybody  
2 here know, and I'm including Andrew Brown, my clerk in this,  
3 does anybody know whether the Eleventh Circuit has adopted the  
4 stream of commerce plus test or whether the Eleventh Circuit  
5 still applies the stream of commerce test?

6 MR. CHARLES: I am not confident, Your Honor, but I  
7 know that the Supreme Court's recent decision in *Nicastro*, six  
8 justices rejected the pure stream of commerce theory where  
9 foreseeability alone was sufficient, putting a product into the  
10 stream of commerce and foreseeing that it would end up in a  
11 particular forum.

12 THE COURT: Four rejected that?

13 MR. CHARLES: The plurality clearly rejected that and  
14 I think the two conferring justices also rejected that  
15 foreseeability alone was sufficient and held that there had to  
16 be the purposeful element.

17 THE COURT: Yeah. I have concerns now about the due  
18 process level. I will read the *Nicastro* case again. But it  
19 seems to me as though the most that can be said for the  
20 complaint is that in regards to these two defendants, it  
21 alleges placing something in the stream of commerce and that  
22 there was otherwise business being done in Georgia.

23 I don't believe it alleges that there was knowledge  
24 on behalf of the defendants that these items would be used in  
25 Georgia or evidence that they were sold for the purpose of

1 going into Georgia, in other words, I'm not sure that it would  
2 meet the stream of commerce plus test, for example, some  
3 evidence of showing that -- or some allegation showing that  
4 there was a purpose to serve the market in the forum state.  
5 For example, by designing the product for the forum state,  
6 advertising in the forum state, having channels to market and  
7 get customers in the forum state, have distributors who are  
8 targeting the forum state.

9 I don't know that there's enough evidence here to  
10 determine that the amount of money made was sufficient to  
11 satisfy the minimum contacts. I'm going to look at that again.  
12 I don't know that there is anything else I want to hear about  
13 it, but I have a higher level of concern over just these  
14 allegations and even without a countering affidavit from the  
15 defendant whether 38 through 41, even if you read into it  
16 Paragraph 8, and even if you read at Paragraph 42, is enough to  
17 satisfy the due process clause, to satisfy the due process  
18 clause.

19 You know, there's an argument about each defendant  
20 being a representative of the other defendant. If there's  
21 anything that you would like to say about that, Ms. Anello, let  
22 me know. It seems to me as though there is some level of more  
23 specific pleading required to overcome the Eleventh Circuit's  
24 repeated statement that entities that are separate are treated  
25 separately unless you have some evidence of control by one over

1 the other. And I don't think you have that here. You  
2 certainly have not alleged it.

3 MS. ANELLO: We're not alleging control. We  
4 recognize that they are separate entities, however, as separate  
5 entities, separate Olympus entities, they work together to do  
6 everything that is alleged in the complaint: Manufacture,  
7 market and sell, whether directly or indirectly, they're all  
8 working together. If you look at their certificates of  
9 service, they actually identify about 20 other more entities  
10 that could potentially have an interest in this, all associated  
11 with Olympus, that they felt that they had to include on their  
12 certificate of interest -- or corporate disclosure statement,  
13 whichever it is, because they are related entities. But the  
14 allegations are against them as separate and distinct entities.

15 THE COURT: Okay.

16 MS. ANELLO: The only thing I would like to add is I  
17 would respectfully disagree with the Court's holding, I do  
18 believe our complaint is sufficient enough to survive both  
19 the -- I generally know it's a holding cap, the Court's -- my  
20 reasoning. I do believe it is sufficient to overcome the  
21 minimum due process standards. And to remember that this is  
22 not something where the defendants just randomly got their  
23 product to Georgia, it was fortuitous that they ended up in  
24 Georgia. In a lot of the cases they cite to, they do  
25 discuss -- there are cases where there has been no contact with



1 Georgia, but like one circumstance that was completely  
2 unrelated to confer jurisdiction, they're basically arguing  
3 that we -- as manufacturer, distributor, labeler, advertiser,  
4 promoter of the products, because they're in Japan, because  
5 they put -- they put their product in the stream of commerce,  
6 they know through their entities that are related to them that  
7 it's going to get to places such as Georgia, and they're just  
8 not going to be subject to the Court's jurisdiction. And I do  
9 believe that we have alleged enough to support that.

10 THE COURT: But you haven't alleged that they made  
11 this product knowing that it would get to Georgia and for that  
12 purpose.

13 MS. ANELLO: Is there anything -- I believe there  
14 might be something in the -- let me find -- this is not the  
15 complaint.

16 THE COURT: Because that is more like the *Betancourt*  
17 case where they looked at -- one of the things that they looked  
18 at was -- it was one of their Ks, I don't know whether it was a  
19 10K. No, not the *Betancourt* case.

20 MR. CHARLES: *Brazil*.

21 THE COURT: Was it *Brazil* or *GenTran*?

22 MR. CHARLES: *Brazil* was the 10K.

23 THE COURT: Okay. Right. Oh, that's what the  
24 defendant put forward for their 10K. I'm thinking of another  
25 one. I'm thinking of -- give me a moment. I'm thinking of the

1 *Betancourt* case where they use their annual report to show that  
2 the defendant was complying with various local, state and  
3 provincial regulations so that it could sell their products and  
4 distribute their products there.

5           This says: It is apparent that Patheon did not  
6 simply place the birth control pills at issue in this case into  
7 the stream of commerce with no idea of where they would be  
8 marketed and/or sold, instead, Patheon actively manufactured  
9 such pills for ultimate sale and consumption within the United  
10 States, including the State of Georgia. This is the type of  
11 additional conduct that Judge O'Connor cited as sufficient to  
12 satisfy the stream of commerce plus test for minimum context.

13           And they also had evidence that, for example, they  
14 had -- there was an allegation that they had a sales team that  
15 comprised 14 members that covers the United States. At any  
16 rate, I want to look at that a little more in the light of the  
17 minimum contacts test and see whether I think you have  
18 satisfied that. I think defendant has conceded that if we are  
19 allowed to simply accept the allegations in those paragraphs  
20 that it meets the long-arm statute.

21           MR. CHARLES: That's correct.

22           THE COURT: But that it might not -- but they sort of  
23 rely upon the minimum contacts. Plaintiff concedes that  
24 they're not looking for general jurisdiction, but rather  
25 specific jurisdiction. So I want to go back and review that

1 case some more and I'll have to do that before we rule on  
2 anything, okay?

3 Is there anything else, Ms. Anello, any other case  
4 you want to cite on that fact or on that argument at all? You  
5 cited the *Black Box* case; is that right?

6 MS. ANELLO: Yeah, the *Black Box* case. And I know in  
7 my brief I rely on the in re *Performance* case as well, it was  
8 actually *Performance Systems Group, Inc.* 2012 U.S. District  
9 Lexus 118725, but no --

10 THE COURT: No. Read me those again.

11 MS. ANELLO: I'm sorry. I talk fast. I'm a court  
12 reporter's nightmare.

13 THE COURT: 11725?

14 MS. ANELLO: 118725.

15 THE COURT: Okay.

16 MS. ANELLO: And if I could just look through my  
17 notes real quick. Nothing further for us on personal  
18 jurisdiction.

19 THE COURT: Okay. So let's go to the next motion,  
20 the 12(b)(6), and I'll give you just a jumping off point. I  
21 don't think I need to hear argument on the statute of  
22 limitations. I think that I have seen a case which says that  
23 the date of the injury is really the date that the person  
24 became sick rather than the date that they ate the meat. Do  
25 you know the case I'm talking about?

1 MS. ANELLO: Um-hmm.

2 MR. CHARLES: I'm not familiar with that case.

3 THE COURT: I'm talking about, and you can look at  
4 it, *Crook-Petite-El v. Bumble Bee Foods*, it's 2017 Westlaw  
5 3495924. It's a June 2017 case in which they decided that the  
6 claim accrued when the plaintiff became ill from eating the  
7 tainted meat, rather than the date on which she ate the meat.  
8 It's hard for me to believe that the statute of limitations on  
9 Ms. Quashie could run in the seven days after the surgery  
10 before she ever knew anybody had done anything wrong to her, so  
11 I don't know if it's -- I haven't dug deeply into the discovery  
12 rule and all of that, but -- and I don't know how an infection  
13 begins. I don't know whether an infection starts immediately  
14 or whether it's there and your body can overcome it to a  
15 certain amount and only when it gets to be a certain amount  
16 worse your body can't overcome it itself and therefore it's  
17 really the injury and the claim is when your body succumbs to  
18 infection and it manifests. I don't know. I'm not a  
19 scientist.

20 But it seems to me that the claim doesn't arise until  
21 the 17th or the 24th, when she goes into the hospital and  
22 begins to realize there's something wrong with her. So I don't  
23 need to hear any more about that. I've read it. I'll reread  
24 the cases. If I disagree with those cases, I'll let you know.

25 And I am concerned, and it's less for you than it is

1 for Ms. Anello that I'm not sure that they meet the pleading  
2 standards here, particularly on fraud, of the who, what, when  
3 and where, because I do think the general nature of it of sort  
4 of saying everybody did everything is hard. And I'm not sure  
5 then it's even okay, because I still don't know what they said,  
6 when they said it or who said it. But if you want to talk  
7 about that first, go ahead.

8 MR. CHARLES: Yes, Your Honor. I'll touch on, I  
9 guess, two issues on the pleading standards. But as a  
10 threshold issue, the plaintiff filed an original complaint in  
11 this Court that was substantially identical to the amended  
12 complaint that she filed. Defendants accordingly filed motions  
13 to dismiss that are substantially identical to the motions to  
14 dismiss that are now before you.

15 As the Eleventh Circuit said in *Eiber Radiology*, we  
16 have never required district courts to grant counsel plaintiffs  
17 more than one opportunity to amend a deficient complaint nor  
18 have we concluded that a dismissal with prejudice is  
19 inappropriate where a counsel plaintiff has failed to cure a  
20 deficient pleading after been having offered ample opportunity  
21 to do so.

22 So we would suggest that dismissal with prejudice is  
23 appropriate here when the complaint does not state the claims  
24 with a required level of either plausibility or particularity  
25 as required under the relevant pleading standards. The courts

1 in this district have done so in *Barnes* and in *Thornton* and in  
2 a medical device case in *Nassar Cure* dismissed with prejudice  
3 in a very similar procedural posture where the defendant had  
4 brought a motion to dismiss, there was an amendment and another  
5 motion to dismiss, and we'd suggest that that's the right  
6 approach here, Your Honor.

7 THE COURT: Which case is that?

8 MR. CHARLES: *Eiber Radiology* is an Eleventh Circuit  
9 case that discusses this and it says dismissal with prejudice  
10 is the default. And then the courts in this district in *Barnes*  
11 and in *Nassar Cure* and in *Thornton*, all dismissed with  
12 prejudice, very similar complaints that alleged products  
13 liability cause of action.

14 THE COURT: Okay.

15 MR. CHARLES: Your Honor, I think you're absolutely  
16 right about the fraud counts. I'm happy to address any  
17 particular issues you have about those, but I'll focus on the  
18 product liability counts, because it seems like Your Honor  
19 recognizes the problems with the fraud counts.

20 THE COURT: Yes.

21 MR. CHARLES: For the strict liability counts,  
22 Your Honor, we'd suggest that there is one flaw that runs  
23 throughout all of those, and that's a failure to allege  
24 specific causation. *Twombly* and *Iqbal* direct that the  
25 formulaic recitation of the cause of elements is insufficient.

1 And here Ms. Quashie does nothing more to connect any product  
2 defect to her infection than simply allege that it was the  
3 proximate cause. That is insufficient.

4 The *Barnes* case, Your Honor, discusses the difference  
5 between general causation and specific causation. In *Barnes*,  
6 the plaintiff had taken a prescription drug, that was Nexium in  
7 that case, and the plaintiff said here's all this research  
8 showing that Nexium causes kidney injuries. I took Nexium, I  
9 suffered a kidney injury. The court said that's not enough,  
10 that shows general causation between Nexium and kidney  
11 injuries, but you haven't alleged specific causation.

12 Here Ms. Quashie hasn't alleged any facts to support  
13 her causation allegations. For instance, she doesn't allege  
14 that the hospital took the scope out of commission after her  
15 procedure. She doesn't allege that it ever cultured positive  
16 for any bacteria. She doesn't allege there was an outbreak of  
17 infections at Emory Johns Creek Hospital or, indeed, that any  
18 other patients were infected. In fact, she doesn't allege that  
19 Emory Johns Creek Hospital is doing anything differently today  
20 with regards to its ERCP and its scopes than it did on the day  
21 that she had the procedure. That's insufficient to support the  
22 causation analysis, Your Honor.

23 Furthermore, *Twombly* and *Iqbal* direct this Court to  
24 use common sense and judicial experience to determine whether a  
25 complaint has raised the claim from the conceivable level to

1 the plausible level. And it's common sense that infections  
2 happen in hospitals. Ms. Quashie's pure allegation that she  
3 underwent a procedure on August 7th, she was diagnosed on  
4 August 27th with an infection does nothing more than create a  
5 conceivable or speculative guess that the scope was the cause  
6 of that injury.

7 Your Honor, that affects all of her claims --

8 THE COURT: How could she do more than that at the  
9 pleading stage? Right? Doesn't that put you-all on notice as  
10 to what the issue is? She alleges she had a procedure, that  
11 this scope was used in the procedure, that this scope has a  
12 design defect that makes it harder to clean and that carries  
13 microbial --

14 MR. CHARLES: Contaminants.

15 THE COURT: -- contaminants.

16 MR. CHARLES: Sure.

17 THE COURT: And that two weeks after it, she had an  
18 antibiotic-resistant infection. How is that not enough to put  
19 you-all on notice as to what her claim is?

20 MR. CHARLES: Your Honor, I think actually here  
21 *Twombly* and *Iqbal* are instructive, not just for the holding,  
22 but for their facts. In *Twombly*, the plaintiff had alleged  
23 that there was parallel conduct and then actually alleged that  
24 there was an agreement. And the court said even if that puts  
25 them on notice of what's being alleged, they're being alleged



1 of engaging in a Sherman Act conspiracy to restrain trade,  
2 that's not sufficient to raise from the conceivable level to  
3 the plausible level, because it's consistent with lawful  
4 conduct.

5 Similarly, *Iqbal*, the plaintiff had alleged that  
6 there was unlawful discrimination under the First and  
7 Fourteenth Amendments, specifically alleging that the attorney  
8 general and the FBI director had developed a policy to detain  
9 individuals of Muslim religion and target them based on their  
10 national origin. And the court in *Iqbal* actually looked at  
11 alternative explanations and said it's far more likely to be  
12 the fact that a substantial majority of the people detained  
13 happen to be Muslim and happen to be of Middle Eastern origin  
14 because the FBI director and the attorney general were  
15 investigating the 9/11 terrorist attacks.

16 And so similarly here, Your Honor, it's far more  
17 likely that the infection that occurred, occurred the same way  
18 lots of infections occur in hospitals, and that's from other  
19 transmission mechanisms. She could have alleged facts to  
20 support a causal inference, such as that there was -- there's  
21 anything that's being done differently at Emory Johns Creek,  
22 that was certainly within her ability to discover before  
23 bringing this lawsuit.

24 THE COURT: They do allege that your client has  
25 changed the way -- that when they went back for FDA approval,

1 they changed the design of it because they became aware of the  
2 problem.

3 MR. CHARLES: Yes, Your Honor. There has been a  
4 design change, but she -- it doesn't link that design change to  
5 what caused her problems. She mentions the O-ring, that this  
6 was -- there was a tighter variance for the O-ring.

7 THE COURT: Right. And she says you had one design.

8 MR. CHARLES: Yes.

9 THE COURT: Defendant became aware that there were  
10 problems with this design. When the FDA came around, they  
11 changed the design to do away with this problem.

12 MR. CHARLES: Yes. And that -- that, to me, would be  
13 the same as a general causation in *Barnes*, that there's this  
14 drug, Nexium, that if the FDA comes around and says this is  
15 causing too many kidney injuries and the defendant then changes  
16 the chemicals in the Nexium, that's general causation. It  
17 doesn't link this particular scope to an infection with  
18 Ms. Quashie.

19 It would be more likely, and a much harder case, if  
20 there had been, say, 12 patients who were alleged that they  
21 were infected at Emory Johns Creek Hospital. But it's common  
22 sense that, one, infections happen in hospitals, and two, this  
23 scope was likely used in other patients and nobody else has  
24 come forward and said they were infected as a result of a  
25 procedure at Emory Johns Creek Hospital, making it less likely

1 that the scope is the explanation. And that's what *Iqbal* says  
2 that this Court ought to do is look at conceivable --  
3 alternative explanations and see if they're as consistent with  
4 the allegations as the one that plaintiff made.

5 THE COURT: Would it be enough if she alleged that  
6 she got the infection from this scope?

7 MR. CHARLES: It might be --

8 THE COURT: Doesn't she allege that?

9 MR. CHARLES: I'm not entirely clear, Your Honor. I  
10 don't think she alleges that this scope had on it microbial  
11 contaminants as a result of any of the defects that she  
12 identifies.

13 THE COURT: Would it be enough if she said that?

14 MR. CHARLES: If she said that this particular scope,  
15 yeah, had on it contaminants, that she had the procedure and  
16 that those contaminants were transferred to her. I think that  
17 would be sufficient, Your Honor. But it's important to note  
18 that --

19 THE COURT: All right. Well, hold on. I didn't mean  
20 to set a trap on you.

21 MR. CHARLES: Okay.

22 THE COURT: Because Paragraph 15, it says: Quashie  
23 was caused to suffer this life-threatening,  
24 antibiotic-resistant infection as a result of defendants' scope  
25 that was used during the aforementioned procedure.

1 MR. CHARLES: Yes, Your Honor. But in that  
2 paragraph, there's no identification of what defect she's  
3 alleging caused the problem. She identifies a couple of  
4 different kinds of defects, maybe it was the O-ring or maybe it  
5 was an insufficient cleaning protocol. She doesn't allege what  
6 kind of defect caused these injuries.

7 And these are the same arguments, Your Honor, that we  
8 made as to the original complaint. And there aren't any more  
9 allegations to suggest that she has connected the scope  
10 causally to her infection.

11 THE COURT: Was the initial complaint and motion to  
12 dismiss ruled on?

13 MR. CHARLES: No, it was -- I think it was withdrawn  
14 or moot by consent. I'm not entirely sure.

15 THE COURT: Because the amendment came down in time?

16 MR. CHARLES: Yes.

17 THE COURT: Okay. Anything else you want to say  
18 about that?

19 MR. CHARLES: No, that's it, Your Honor.

20 THE COURT: Okay. And I should look at the *Eiber*  
21 *Radiology*, *Barnes*, *Thornton* and *Nasser* cases?

22 MR. CHARLES: Yeah, *Nassar Cure* and *Barnes* and the  
23 *Thornton* case, too, Your Honor, and the *Nexium* case.

24 THE COURT: Okay. Okay.

25 MR. CHARLES: Thank you.

1 MR. SMITH: Your Honor, my colleague, Diana  
2 Yastrovskaya -- pronounce that -- will be arguing in response.  
3 I just wanted to say regarding the amendment of pleadings, we  
4 pled initially as an amendment, as a right, and stand by our  
5 pleadings as they are today. But the amendment of pleadings  
6 should be given liberally, and even a lot of the case law cited  
7 by the defendants allow for the amendment of pleadings before  
8 an automatic dismissal with prejudice. So we would ask that we  
9 be given leave free to amend.

10 THE COURT: I understand. And I am concerned that  
11 your -- the way that you-all pled to try to keep all the  
12 defendants in it --

13 MS. ANELLO: I'm sorry, I missed that.

14 THE COURT: I'm concerned that the way that you pled  
15 it, in an effort to keep all of the defendants in the case, has  
16 caused some of the problems in your 12(b)(6) pleadings. But  
17 I'm not -- that might come out as I speak with  
18 Ms. Yastrovskaya. Go ahead.

19 MS. YASTROVSKAYA: Basically, Your Honor, the  
20 defendant -- we pled that not only was the scope defective, but  
21 we also pled how it was defective. Basically, there could be  
22 more than one allegation of defect and there could be more than  
23 one defect playing together, like, for example, the O-ring that  
24 allowed leakage and the small crevices together, the bacteria  
25 could leak into the crevices and that it hadn't been properly

1 cleaned.

2           Additionally, the improper reprocessing instructions  
3 which didn't provide proper guidance for the cleaning process  
4 could have also played into the defect and into the infection  
5 that Ms. Quashie suffered.

6           THE COURT: You can't possibly know more than that.

7           MS. YASTROVSKAYA: Exactly, at this stage.

8           THE COURT: It seems unfair to require more than  
9 that, Mr. Charles, when they do allege, like she says, three  
10 things: Really small crevices, a leak, a leaky O-ring and poor  
11 instructions on how to clean it. How can they do more than  
12 that? And you can have your chance to respond to that. I'm  
13 not going to interrupt you. Go ahead.

14           MS. YASTROVSKAYA: Basically, yeah. So plaintiff did  
15 adequately allege there was a defect and this is the defect  
16 that caused her infection. And she also alleged that she  
17 suffered a life-threatening antibacterial infection, which she  
18 was hospitalized for. So because of that, it's our position  
19 that the complaint adequately sets forth the claims of design  
20 defect.

21           THE COURT: My concern on the defect claims, I have a  
22 series of concerns on what I'll call the strict liability  
23 claims and maybe the negligence claims and then the -- as  
24 opposed to the fraud-based claims. So there's three that fall  
25 under the normal standard and four that fall under the

1 heightened pleading standard, I think.

2 But, again, I keep going back to the *Brazil* case. If  
3 you look at that case where they get into -- where it talks  
4 about whether it's a shotgun pleading, and defendants are not  
5 arguing now it's really a shotgun pleading, but they do allege  
6 that there are -- the defendants are all thrown in it together.  
7 And the pleading mistake where -- this is on Page 16, my  
8 Page 16, it's under the part entitled strict liability.

9 MS. ANELLO: Your Honor, there's a March 2016.

10 THE COURT: The March one.

11 MS. ANELLO: Thank you.

12 THE COURT: What does the July one address? Is it a  
13 subsequent motion to dismiss?

14 MS. ANELLO: It was a subsequent motion to dismiss  
15 where some were allowed and some were not.

16 THE COURT: Okay. Okay. This one, this concerns me  
17 that in this case, the plaintiff alleged that the defendants  
18 designed, researched, manufactured, tested, advertised,  
19 promoted, marketed and sold, blah, blah, blah, blah, blah,  
20 Invokana. That's a lot like your allegation. Your allegation  
21 in -- throughout it where you identify the parties you-all say  
22 that the defendants did this. You have the same allegation  
23 against each defendant.

24 And what he says is, he cites another case, the  
25 *Henderson* case, third, plaintiffs failed to distinguish between

1 defendants or to specifically allege whether Defendant Caraco  
2 and any other defendant is a manufacturer, distributor,  
3 supplier or seller of the product at issue.

4 So my concern there is -- and it goes on: Plaintiff  
5 does not distinguish between any of the defendants, it said:  
6 Plaintiff's allegations are largely legal conclusion which are  
7 not sufficient to meet the *Twombly/Iqbal* standard.

8 My concern is that I don't know which defendant you  
9 believe did these things. And I think that -- I think that  
10 that's a pleading deficiency. And it goes on, on the  
11 negligence one to say, again, plaintiffs did not specify how  
12 any specific defendant breached any duty. Plaintiff's lack of  
13 specificity as to the acts of any specific defendant fails to  
14 provide proper notice of her claims to any one defendant.  
15 Plaintiff may use alternative pleading, but greater factual  
16 specificity is necessary.

17 And my concern is that the way you-all have pled it  
18 in a group of defendants, that everybody did everything  
19 together, is insufficient to state a claim against any specific  
20 defendant. Can you talk to me about that?

21 MS. YASTROVSKAYA: At this stage, Your Honor, in the  
22 proceedings, it's our allegation that they all worked together,  
23 that each defendant worked with each of the other defendants  
24 together to market and promote and distribute and sell this  
25 product into the stream of commerce and it had the defect that



1 we allege, either the design defect or failure to warn or it  
2 was negligently designed and manufactured. They all -- each  
3 and every defendant worked together, and even though they are  
4 separate entities, they are related and they were involved in  
5 the process of developing and marketing and distributing and  
6 manufacturing these scopes together.

7 THE COURT: So which one do you believe designed it?

8 MS. YASTROVSKAYA: At this point, we believe that  
9 each had an input in the design.

10 THE COURT: And which one manufactured it?

11 MS. YASTROVSKAYA: We know that it's the Japanese  
12 defendant that manufactured it, but again, all four had input  
13 as to how it was manufactured, what information they chose to  
14 disclose, what information they chose not to disclose in the  
15 label or in their reprocessing instructions.

16 THE COURT: And which one of them sold it?

17 MS. YASTROVSKAYA: Again, they all had an  
18 involvement, they all had a part in the sales process in --

19 THE COURT: I'm just not sure that that's enough. I  
20 mean, because in the end what you're going to do when you get  
21 down to summary judgment is you're going to allege we've pled  
22 every one bought and sold and manufactured and promoted and  
23 designed, and therefore, it's okay for us to go after this  
24 defendant now on this theory and this defendant now on this  
25 theory. And I'm not sure that that's what *Iqbal* allows. I'm

1 concerned that under *Iqbal*, you have to be more specific with  
2 these defendants as to what you believe each one of them did.  
3 Because are you really alleging that each defendant  
4 manufactured this?

5 MS. YASTROVSKAYA: Yes, Your Honor. We are alleging  
6 that each defendant had a part in the manufacturing process.

7 THE COURT: That's not my question.

8 MS. YASTROVSKAYA: And had a decision-making part in  
9 the manufacturing.

10 THE COURT: So you believe that the Canadian -- the  
11 entity that was selling, responsible for sales in Canada, the  
12 U.S. and Mexico --

13 MR. CHARLES: Latin America.

14 THE COURT: Latin America.

15 -- was manufacturing this product?

16 MS. YASTROVSKAYA: We believe that they had an input,  
17 a say as to how these products would be manufactured.

18 THE COURT: Okay. What does that mean?

19 MS. YASTROVSKAYA: That they were decision makers in  
20 the manufacturing process.

21 THE COURT: In what way? Because I'm not sure how  
22 they can defend themselves until they know that.

23 MS. YASTROVSKAYA: Okay. Your Honor --

24 THE COURT: Are they getting input or are they -- do  
25 you see what my issue is?

1 MS. YASTROVSKAYA: I do, Your Honor. It's just for  
2 the purposes of Rule 8(a) at this stage of the proceedings  
3 defendants have fair notice of what the claims are and the  
4 grounds upon which they rest, so --

5 THE COURT: Yeah.

6 MS. YASTROVSKAYA: -- going forward at summary  
7 judgment, there will be a different standard where we will have  
8 to show how each defendant was involved in the manufacturing or  
9 the design process. But at this stage of the proceedings,  
10 there's fair notice to the defendant, to all four defendants as  
11 to what the claims are against each one of them.

12 THE COURT: I mean, you may be right. I mean, your  
13 case is a little different than some of the others in that your  
14 overarching allegation is more finite than in some of these  
15 other cases. But I remain concerned, and I'll have to go back  
16 and look at some of those, that the language I read you out of  
17 the *Brazil* case would apply here as well.

18 I mean, you're sort of saying that your claim against  
19 each defendant would be the same if they were the only  
20 defendant here, right? In other words, you would be saying  
21 that this defendant did each one of these things and that the  
22 next defendant did each one of these things. Right? That's  
23 essentially what you're saying?

24 MS. YASTROVSKAYA: Exactly, Your Honor. And I think  
25 it was in one of the footnotes.

1 THE COURT: So, Mr. Charles, I'd like to hear your  
2 thoughts on that as well, because, you know, if there really is  
3 a claim that defendant one did all of these things and  
4 defendant two did all of these things, then maybe the general  
5 allegation of all defendants is not the same error that the  
6 court found in the *Brazil* case. I don't know whether that  
7 affects what they can do at summary judgment or whether they  
8 can get to summary judgment and then break it out into, well,  
9 this one, this defendant manufactured, this defendant marketed,  
10 this defendant designed. So when we get back to you, I'd like  
11 to hear that.

12 MR. CHARLES: Yes, Your Honor. I think you're right  
13 to point out the concern that *the Brazil* court raised, and  
14 certainly I don't think the *Brazil* court would have accepted a  
15 response as sufficient from the plaintiff that were alleging  
16 everybody did everything as the plaintiff seems to suggest  
17 here. But they also said that they don't really think that  
18 everybody manufactured, they just think everybody had some  
19 input into the manufacturing process.

20 THE COURT: Right. And I'm going to come back to  
21 that in a minute. But I'm not sure that's not enough. I'm not  
22 sure that what Ms. Yastrovskaya --

23 MS. YASTROVSKAYA: Yastrovskaya.

24 THE COURT: Yastrovskaya.

25 -- said is they all had input in that. What she

1 didn't say is, no, no, one designed, one sold, one marketed.  
2 She said that this one was responsible for the design by input  
3 or the manufacturing by saying what should be done, that seems  
4 different to me than what I thought, which was that there would  
5 be an admission that there was a design and a manufacturing and  
6 a marketing and sales.

7           So maybe -- but I'll get back to that in a minute.  
8 Can you talk to me about the fraud claim, because my  
9 understanding of the fraud claims is a higher level of who,  
10 what, when and how. And I see your general allegations that  
11 they said it was superior, they said it wouldn't contaminate,  
12 they said it was safe and all of those things were false.

13           But what I want to know is if any of these fraud  
14 cases mean anything, what they say is you have to allege the  
15 who, what, when and where. And I don't have a single date, I  
16 don't have a single statement. I have a general description of  
17 the statements rather than something that is like on this day,  
18 they put out a press release that said this or this defendant  
19 said this in marketing materials or anything like that. And I  
20 think that's what you need for fraud.

21           MS. YASTROVSKAYA: Just one moment, Your Honor.

22           THE COURT: Sure.

23           MS. YASTROVSKAYA: Okay. Your Honor, as far as the  
24 who -- again, we allege that it was each and every defendant.  
25 The when, generally, it was between 2015 -- 2010, when the

1 defendants first began to market the Q180V scope to August of  
2 2015, when the plaintiff had her surgery. Throughout the  
3 complaint, we also allege that by May of 2012, defendants were  
4 aware that their design of the scope was defective, and that it  
5 allowed for the retention of the microbial contamination. But  
6 they failed to notify the FDA. By autumn of 2012, the  
7 defendants knew that the Q180V scope was linked to outbreaks of  
8 dangerous infections, this is 67, 68, 69, 70, so we do have  
9 some particular dates on which the defendants became aware of  
10 the infection in both the United States and Europe and failed  
11 to notify the FDA.

12           Additionally, defendants throughout their media  
13 advertisement in the defective reprocessing instruction and in  
14 the label, which lacked the warning about the bacterial  
15 contamination, that's where, you know, they fraudulently claim  
16 that the scope was, in fact, safer and would not be spreading  
17 infection.

18           THE COURT: You actually refer to the label?

19           MS. YASTROVSKAYA: I believe so, yes. One minute.  
20 If you go to 184 through 185 and 188, the information  
21 distributed to the public, the FDA and the plaintiff by each  
22 and every defendant intentionally included representations that  
23 the Q180V scope was safe and effective for its intended use,  
24 and that information does include the label as well as the  
25 advertising materials.

1 THE COURT: Which paragraphs again?

2 MS. YASTROVSKAYA: I believe it's 184, 185, 188. We  
3 allege the defendants intentionally distributed false  
4 information to plaintiff's doctors, hospitals and healthcare  
5 professionals as well as the FDA.

6 THE COURT: Does it mention a label? Because if we  
7 just look at these allegations, distribute false information  
8 assuring the public that the scope was safe and effective,  
9 omitting certain test results -- for your information, this is  
10 187 -- to the public, the FDA and the plaintiff by press -- by  
11 reports, press releases, advertising campaigns, print ads,  
12 magazine ads and all other commercial media, contained material  
13 representations of fact and/or omissions. I think that falls  
14 squarely under the guidance that the Eleventh Circuit has said  
15 that you have to provide information as to what those  
16 allegations are, when they were made and who made them.

17 Unless you're really arguing here that all three  
18 defendants or all four defendants said it at the exact time,  
19 that doesn't pass the straight face test to me. You might be  
20 able to say they all were involved in manufacturing, but  
21 there's no way they all made a statement at the same time. And  
22 so, for example, what press release are we talking about? What  
23 report? What advertising campaign? What print ad are we  
24 talking about here that contains a false statement? You  
25 can't -- how can that be assessed with a heightened pleading

1 standard unless those items are identified? That really runs  
2 to the heart of my concern on this.

3 MS. YASTROVSKAYA: And those statements particularly  
4 were made on the defendants' website and, again, it's our  
5 position that all the defendants had an input as to what was  
6 going to be distributed regarding the safety of the scope.

7 THE COURT: Wait. What claims were put on the  
8 website?

9 MS. YASTROVSKAYA: Their press releases were on the  
10 website, the copy of the label is typically on the website, any  
11 information regarding the safety of the scope, its reprocessing  
12 instructions would be on the website. And even though each  
13 defendant didn't simultaneously make those statements, again,  
14 it's our belief at this stage that all -- all four defendants  
15 had an input as to what information was going to be distributed  
16 to the public, to healthcare professionals and to what was  
17 going to be given to the FDA.

18 THE COURT: Right. Even if that's true, I think you  
19 have to say -- I don't think giving a one-year window is  
20 enough. If you look at cases like the *Tri-State Consumer*  
21 *Insurance Company v. LexisNexis*, I think it's a Judge Batten  
22 case, 823 F Supp. 2d 1306. In there, it was like a year, false  
23 statements made during this year period. He said that's not  
24 enough to satisfy Rule 9's requirements. And what you-all have  
25 posited to me is a five-year timeframe when the defendants said



1 things on websites, press releases, labels, none of which I  
2 can -- none of which they can say and go defend.

3 It just seems to me as though you guys traveled  
4 pretty far under the general allegation, but when you bring a  
5 fraud claim, I think that's the -- I think that's a bridge too  
6 far for the generality. And I'd like to know if you have a  
7 case. I don't know that we need to have much more argument on  
8 it.

9 MS. YASTROVSKAYA: No, Your Honor, we don't have  
10 another case at this time. We ask for leave to amend the fraud  
11 complaint.

12 THE COURT: Did you ask for that in your pleading?

13 MS. ANELLO: Yes.

14 MS. YASTROVSKAYA: I believe so.

15 MS. ANELLO: At the very end, the very last page.

16 THE COURT: Okay.

17 MS. YASTROVSKAYA: Yes, on Page 25.

18 THE COURT: Yeah, I see it. Okay. Okay.

19 Mr. Charles, anything you want to say in that regard?

20 MR. CHARLES: Yes, Your Honor. Two points there. On  
21 the leave for amend -- to amend.

22 THE COURT: That's really my issue, because I --

23 MR. CHARLES: Yes.

24 THE COURT: -- don't think this case -- I don't think  
25 this complaint comes close to the 9(b), and I've got to look at

1 the non-fraud-related claims a little more carefully and see if  
2 I think you get there on that. I need to pull apart a little  
3 bit the cases that talk about grouping defendants.

4 The 9(b), if it means anything, it means telling who  
5 said what when. And I don't think that a general claim that it  
6 was alleged to have been safe is really enough for that.

7 MR. CHARLES: And, Your Honor, I would suggest that  
8 we raise the same argument to the original complaint, and it  
9 was not amended to satisfactorily comply with Rule 9(b). And  
10 as Your Honor suggests, a five-year window, ten different  
11 categories of places where misrepresentations could be made  
12 doesn't come close to meeting Rule 9(b). They didn't correct  
13 it. They shouldn't be given another chance to do so.

14 The Eleventh Circuit's decision in *Posner* also  
15 suggests that merely raising an argument for leave to amend in  
16 response of pleadings is not sufficient to raise it under  
17 Rule 15. They haven't filed a brief or a motion requesting  
18 that with factual support and we think it would be futile here  
19 under the circumstances.

20 THE COURT: But that's different. Would it be  
21 futile? I mean, because what they've said is, for example,  
22 there is a label and there was a press release and there was  
23 something on a website. I'm not sure that they've conceded  
24 that this is all they can allege.

25 MR. CHARLES: That may well be, Your Honor, that they

1 haven't conceded that. But I think that's a separate point, is  
2 that it's futile. But, first of all, that they shouldn't be  
3 allowed to do so because they didn't change it at the time.  
4 And as the courts in this district have done, that merits  
5 dismissal with prejudice, and they haven't properly asked for  
6 leave to amend in this case, it's significantly far advanced by  
7 this point already.

8 If Your Honor would allow it, I can touch on some of  
9 the *Twombly* and *Iqbal* claims about the strict liability, back  
10 to those.

11 THE COURT: Sure.

12 MR. CHARLES: I think Your Honor's concern about  
13 failing to identify specific defendants with specific conduct  
14 is well founded. The Court in the *Henderson* case, for example,  
15 found insufficient where the plaintiff had, quote -- or failed  
16 to, quote, allege any relationship between a specific  
17 defendant, a specific breach and a specific end group. And  
18 that was insufficient under *Twombly* and *Iqbal*. Similarly,  
19 here, there's not the relationship between a specific breach  
20 and a specific defendant that caused Ms. Quashie's injuries.

21 And that's important for the strict liability claims,  
22 because under Georgia law, only the manufacturer can be  
23 strictly liable. This is the Georgia Court of Appeals'  
24 decision in *Alltrade* under the statute which is -- I can give  
25 you the exact site 51-1-11, I believe, and 11.1 says: Product

1 sellers are expressly not strictly liable, so it matters who's  
2 doing what conduct. And simply saying all of them had some  
3 input into the manufacturing process is not what the standard  
4 is for who can be held liable as a manufacturer. The Georgia  
5 Court of Appeals in *Davenport* said there's a different standard  
6 for who was a manufacturer under the law.

7 Similarly, Your Honor, the failure to warn --

8 THE COURT: Yeah, there's three different standards.  
9 I forgot to ask her about that. You raised that point in your  
10 brief, right?

11 MR. CHARLES: That there's a separate standard, yes,  
12 Your Honor.

13 THE COURT: There are really three different  
14 standards depending on whether you are the manufacturer or the  
15 distributor or the seller or something like that. Yeah. Okay.

16 MR. CHARLES: And similarly under the failure to warn  
17 claim, there is separate obligations on the manufacturer and  
18 the seller manufacturer has a continuing duty, the seller has a  
19 different duty, so the failure to distinguish among the  
20 defendants and describe which one did what, it's fatal to those  
21 claims.

22 And it's not sufficient under *Twombly* and *Iqbal*,  
23 which require plausible pleadings to say simply that four  
24 separate defendants who we recognize are unique and different  
25 from each other did all of these actions all together. That is

1 not plausible and this Court need not accept that allegation on  
2 its face. That's what the *Brazil* court said, just because  
3 you've alleged that everybody was involved in every activity,  
4 they don't have to accept that as true, that's not plausible  
5 where there's a recognition that two of them are in Japan.  
6 There's an allegation that there is a parent company overseas,  
7 other entities, it's not plausible to suggest that everybody's  
8 doing everything and those different roles matter for the  
9 elements under Georgia law.

10 THE COURT: Okay. Anything else?

11 MS. ANELLO: I was supposed to argue the shotgun  
12 pleadings, and that's actually why I kind of want to turn back  
13 here, because their shotgun pleadings argument mainly dealt  
14 with the naming of the additional defendants. There's a  
15 different standard, I believe, with respect to amending when  
16 that particular issue is a shotgun pleadings, as they're  
17 arguing.

18 And I would refer back to the particular case that  
19 they cited as well, *Kreiger*, where it's saying the appropriate  
20 relief -- like dismissal for such a type of pleading, the  
21 appropriate relief is not -- excuse me. Let me try that again.

22 The appropriate relief is not dismissal because that  
23 is a drastic sanction. Unless there is some kind of  
24 showingness or willfulness or bad faith on the part of the  
25 plaintiffs, then they should be -- the remedy should be either

1 leave to amend or the flagging of a more definite statement, so  
2 I just wanted to throw that out, that that's a little different  
3 standard than the Rule 15, the rule amendment standard. Thank  
4 you.

5 THE COURT: All right. I need to -- I'm not sure  
6 that that carries today, because that's not everything,  
7 especially on the fraud claims. I need to look at what the  
8 rules are on the leave to amend. I don't believe you're in a  
9 situation where you cannot -- where amendment would be futile,  
10 it does not seem that way to me. I may be wrong, but it seems  
11 to me as though part of the reason -- if there was a tactic to  
12 it, maybe the tactic was that it helps on the motion to dismiss  
13 for personal jurisdiction to have everybody lumped together,  
14 but then that comes back to haunt you on the sufficiency of the  
15 allegations. I don't know. But I have to look at that.

16 It seems to me as though there ought to be leave to  
17 amend. And I think that's what the court did in the *Brazil*  
18 case. And I grant -- I grant that there has already been one  
19 free amendment here, but I'm looking at *Brazil* for a lot of  
20 other reasons. I see a lot of similarities here. And he  
21 allowed them to amend in that case, so I'm going to look at  
22 that a little bit more, okay?

23 Anything else anybody wants to say before I do an  
24 order?

25 MS. ANELLO: Nothing with respect particularly to

1 this motion. But an outstanding issue that we had emailed the  
2 Court about regarding discovery as to the Japanese defendants.

3 THE COURT: Well, I don't know that I read the email,  
4 but I do understand that the Japanese defendants are not  
5 providing the discovery until -- because they're claiming there  
6 is no jurisdiction and maybe they're afraid that if they  
7 participate in discovery, that will subject them to  
8 jurisdiction; is that right?

9 MR. CHARLES: Yes.

10 MS. ANELLO: Yeah. I've always respected their  
11 position. And I think all the parties were hopeful that we  
12 would have a decision before now. But the reason it's now come  
13 to the Court's attention so quickly is that plaintiff's expert  
14 reports are currently due on June 6th, and it's very difficult  
15 for us to have our experts proceed with the liability and get  
16 our tort reports ready when we have no discovery from the  
17 defendants if they're still left in the case.

18 And we moved to compel to get discovery from the  
19 defendants, because they still are in the case, and they have  
20 moved to stay. It's technically their burden to move to stay  
21 once we serve our discovery demands and they were just never  
22 responded to, but as our deadlines loom, we need guidance from  
23 the Court regarding this discovery issue.

24 THE COURT: Is there any legal impediment to them  
25 raising a jurisdictional issue if they engage in discovery?

1 MS. ANELLO: They cited to a Fifth Circuit case that  
2 says when you engage in discovery -- and I'm not sure, they can  
3 respond better, but when you engage in discovery, you waive  
4 your right to jurisdiction. Plaintiff would agree, on the  
5 record, right before the Court to stipulate that in no way we  
6 would make that argument if we could get discovery from them,  
7 just to get the ball rolling to meet deadlines and not have  
8 everything drag out. But as for the Eleventh Circuit, I'm not  
9 sure what that argument is, which is why we believe that we  
10 served discovery as party -- you can't just unilaterally say  
11 I'm not serving discovery. They should move for a stay under  
12 the terms of the -- under the law of the Eleventh Circuit or  
13 whatever law they deem fit.

14 THE COURT: Okay. Mr. Charles? Is there another  
15 reason they don't want to engage in discovery?

16 MR. CHARLES: Yes, Your Honor. And that's that  
17 they're not subject to personal jurisdiction here.

18 THE COURT: Yeah.

19 MR. CHARLES: And I'm not aware of any cases, and  
20 certainly none were cited in the email, where a party that had  
21 an objection outstanding to personal jurisdiction was ordered  
22 to engage in not just jurisdictional discovery but merits-based  
23 discovery, which was the discovery that was served on these  
24 entities. As Your Honor knows, there are some case where  
25 there's jurisdictional discovery appropriate and there is, for



1 instance, an affidavit, but I'm not aware of any cases that  
2 have been cited where there is merits-based discovery with a  
3 pending Rule 12(b)(2) motion.

4 THE COURT: I regret that we are in this spot. I  
5 have concerns about the jurisdiction over the two Japanese  
6 companies. If we were to find out that Olympus Corporation  
7 were simply a holding company, I don't know if that's true or  
8 not, I haven't looked at anything about them, that would fall  
9 under a couple of cases that I have seen that would suggest  
10 there's no jurisdiction.

11 As I said before, I have some concerns about whether  
12 or not the pleadings are sufficient. I didn't coming in, but  
13 defense counsel has convinced me that there might be an issue  
14 about the due process. And I understand a foreign  
15 corporation's desire not to engage in discovery in a case where  
16 they don't have -- where they're not subject to jurisdiction.  
17 And I am new at this, but I believe very strongly in my heart  
18 that we are courts of limited jurisdiction, and so I'm not  
19 about to overreach in trying to order somebody to engage in  
20 discovery.

21 So absent evidence that I can compel a foreign  
22 corporation that raises a discovery -- I mean a jurisdiction  
23 issue to engage in discovery while that jurisdictional issue is  
24 pending, I'm not going to do anything to force them to engage  
25 in discovery. I understand maybe it could have been brought up

1 a different way, but I'm not going to make a decision based  
2 upon the process of how we got here on something that is near  
3 and dear to me as the limited nature of the Court's  
4 jurisdiction.

5 MS. ANELLO: And I respect the Court's finding. And  
6 as I mentioned, the reason that I'm bringing this up has to do  
7 with a pending deadline that is upcoming for the plaintiffs for  
8 experts. How can we serve experts without discovery or knowing  
9 where we're at with respect to the Japanese defendants?

10 THE COURT: So is the other discovery proceeding  
11 well?

12 MS. ANELLO: It is proceeding well, but even that  
13 discovery on its own would require this extension. And I'll  
14 kind of try and give you -- so far, they have served us with  
15 over 700,000 pages of documents that we are currently trying to  
16 sift through and review. And my understanding, they can  
17 represent it better, is that these are -- there are other  
18 actions that have been filed against them across the country,  
19 and there -- and I believe we mentioned to the Court that  
20 there's California, JCCP or consolidated litigation, back in  
21 March, there were 29 actions, there may be more, and discovery  
22 is ongoing there as well.

23 My understanding is that I have been produced  
24 discovery that was produced in other litigations, not only the  
25 JCCP, but other actions that were filed against the defendants,

1 and that this should be -- and I'm just using quotes for, like,  
2 general discovery, but they're still needing to produce to me  
3 discovery specific to the defendant -- U.S. defendants, when I  
4 say discovery, the U.S. defendants' discovery as to the  
5 hospital and some of their employee there, and depositions  
6 still need to be taken once the discovery comes in.

7           So it's moving and there has been substantial  
8 discovery. Plaintiffs depositions are scheduled the week that  
9 our expert reports are due, the day of. And the hospital, we  
10 had served a subpoena on the hospital and got a response.  
11 Defendants served a subpoena on the hospital and got a  
12 response. We're currently looking through those responses and  
13 it's very likely within the next month or so we'll be having --  
14 subpoenaing hospital employees for depositions.

15           THE COURT: When does discovery close?

16           MS. ANELLO: Expert discovery -- excuse me. I have  
17 it in front of me.

18           MR. CHARLES: August 20th.

19           MS. ANELLO: Thank you. That's all discovery.

20           THE COURT: That's all discovery?

21           MS. ANELLO: Right.

22           THE COURT: And when are the experts reports due?

23           MS. ANELLO: June 6th is when plaintiff's expert  
24 report is due.

25           MR. CHARLES: And July 9th is defendants'.

1 THE COURT: And what you're saying is you can't --  
2 you need more discovery from the foreign companies to finish up  
3 your expert report?

4 MS. ANELLO: Yes, as well as additional discovery,  
5 what's remaining from the U.S. entities as well.

6 THE COURT: Okay. So why don't we -- is there any  
7 reason that the expert reports can't be due 30 days after the  
8 close -- or at the time discovery ends?

9 MS. ANELLO: I'm sorry, so August 20th?

10 THE COURT: Why do we have to do more than extend the  
11 time for the expert reports?

12 MS. ANELLO: Because the scheduling report  
13 specifically just says that the actual reports are due by June  
14 6th.

15 THE COURT: Right. Couldn't we just extend the  
16 expert time to be at the same time that discovery closes? What  
17 does my standing order say on that?

18 MS. ANELLO: I have it. It's somewhere here.

19 THE COURT: Let me look at it. I don't think it says  
20 anything other than you guys get to decide.

21 MR. SMITH: My quick review says the same, Judge.  
22 And your solution is certainly amenable to us. I think we need  
23 a unique posture.

24 MR. BEAULIEU: Your Honor, this is Rich Beaulieu for  
25 the defendants. As long as I don't take what you're saying to

1 mean that we would exchange expert reports and designations  
2 simultaneously.

3 THE COURT: I think we can agree.

4 MS. ANELLO: Oh, I like that rule.

5 THE COURT: No.

6 MR. BEAULIEU: We do not. And that's not what the  
7 federal rules provide for.

8 THE COURT: Yeah, I agree. You-all ought to give  
9 yours. And then how long do you have now, you have about three  
10 weeks?

11 MR. BEAULIEU: About 30 days, Your Honor.

12 THE COURT: Say again.

13 MR. BEAULIEU: About 30 days, Your Honor.

14 THE COURT: Three days?

15 MR. BEAULIEU: 30 days.

16 THE COURT: Oh, 30 days. Okay. So why don't you  
17 guys do yours, why don't we just extend yours until the day  
18 that discovery closes, August 20th, and then why don't we give  
19 you-all 30 days after that. Does that mean you then have to do  
20 discovery of experts or depositions of experts after that?

21 MR. BEAULIEU: Yes, but I wouldn't anticipate -- I  
22 mean, it depends on expert availability, but that's not --

23 MS. ANELLO: Yes. I anticipate we would be doing  
24 depositions of experts, but with the understanding that it  
25 would be done within this period.

1 THE COURT: Oh, you would do expert -- no, you can't  
2 do expert depositions until after you get your reports.

3 MS. ANELLO: I'm sorry. Maybe I misunderstood the  
4 question. I was talking about expert discovery but after  
5 serving the reports at the new August 20th date.

6 THE COURT: Right. So if you serve yours on the 20th  
7 and they serve theirs around September 20th, whatever is a date  
8 that's not a weekend in there.

9 MS. ANELLO: Would you like us to maybe craft and  
10 coordinate that email with Mr. Martin?

11 THE COURT: No, let's just do it now. Then that  
12 means you're both going to want to depose each other's experts  
13 after that time, right?

14 MS. ANELLO: Yes, correct.

15 MR. BEAULIEU: So sometime around the end of October  
16 then?

17 THE COURT: That's fine.

18 MR. BEAULIEU: That would be 30 days after our expert  
19 reports are due.

20 THE COURT: That's fine. And then that kicks the  
21 summary judgment period as well, right?

22 MR. CHARLES: Yes.

23 MS. ANELLO: Correct.

24 THE COURT: So that kicks summary judgment into --  
25 how long do you have after the close of discovery to do summary

1 judgment?

2 MR. CHARLES: 30 days, I believe.

3 THE COURT: Okay. So that would kick defendants'  
4 motion for summary judgment to 30 days after whatever date we  
5 just said for the experts discovery to be done? Is that right?

6 MR. BEAULIEU: Yes, sir.

7 THE COURT: Harry, did you get those dates?

8 COURTROOM DEPUTY: Yes, sir.

9 THE COURT: So you can just put them on the record.  
10 We'll do a docket entry to set those dates. There's no plan  
11 for rebuttal experts; is that right?

12 MS. ANELLO: There was a plan for rebuttal experts,  
13 it was currently August 6th, which was about 30 days after the  
14 defendants' expert witnesses. We could probably move it down  
15 to three weeks.

16 THE COURT: Okay. So that changes it a little bit.  
17 Or does that mean we can still do depositions during that time?  
18 So you-all want to do plaintiff's expert then defendants'  
19 expert then rebuttal experts then depositions? Or do you have  
20 depositions before rebuttals?

21 MR. BEAULIEU: I think it has to be the first way,  
22 Your Honor, otherwise we don't have the opportunity to depose  
23 the plaintiff's experts on their rebuttal reports.

24 THE COURT: Right. So you want rebuttal witness --  
25 rebuttal experts before depositions?

1 MR. BEAULIEU: Yes. Yes, Your Honor.

2 THE COURT: Okay. I think that makes sense. We have  
3 another case where we're dealing with it in the other context.  
4 And it seems a little unfair to have the depositions and then  
5 the rebuttal. I mean, it just seems like -- I don't know how  
6 that happened, but it happened in another case we inherited.

7 MS. ANELLO: I just had that happen as well.

8 THE COURT: Okay. So does that make sense? We'll  
9 have plaintiff's expert due on August 20th. 30 days later,  
10 we'll have defendants' expert due. 21 days later, we'll have  
11 rebuttal expert, 30 -- within the next 30 days, expert  
12 depositions will occur. And then within 30 days after that,  
13 after that 30-day period ends, during which the experts can be  
14 deposed, 30 days after that, defendants' motion for summary  
15 judgment will be due. Does that make sense?

16 MS. ANELLO: Yes, Your Honor.

17 THE COURT: Okay. I'd like you-all to keep moving  
18 with the discovery so as to not to have to move further. We  
19 will rule fairly quickly on this motion. I don't know which  
20 way we're going to come out, but I would anticipate giving  
21 leave to amend. I would anticipate, subject to me thinking  
22 about it more, ruling that there is not adequate jurisdiction  
23 on the two defendants that are in -- the Japanese defendants,  
24 and that there needs to be some amendment to the pleadings for  
25 specificity, probably on the negligence and certainly on the



1 fraud-based claims, but that you get leave to amend that. And  
2 then discovery should continue, okay? Aren't there cases in  
3 which discovery doesn't start until motions to dismiss have  
4 been decided?

5 MR. BEAULIEU: Yes, Your Honor, some local rules in  
6 various districts across the country differ on that.

7 THE COURT: Okay. Was that considered? This came  
8 from Judge Batten; is that right?

9 MR. BEAULIEU: Yes, Your Honor.

10 THE COURT: He does not do that?

11 MR. BEAULIEU: His standing order at the time did not  
12 provide a stay of discovery as a matter of course when motions  
13 to dismiss were filed.

14 THE COURT: Okay.

15 MS. ANELLO: I've been in courts where they've been  
16 both ways.

17 THE COURT: I'm just trying to figure out which way  
18 I'm going to do it. I see the benefit of doing it the other  
19 way, but if I were to grant a motion to dismiss, all of that  
20 would have been for nothing. Okay. Okay. All right.  
21 Anything else?

22 MR. CHARLES: No, Your Honor.

23 THE COURT: Everybody good? No? Nothing? Okay.  
24 Thank you.

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1 (Whereupon, the proceedings were adjourned at 5:07  
2 p.m.)  
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## REPORTERS CERTIFICATE

I, Jana B. Colter, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on May 21, 2018, in the matter of *CARYL QUASHIE V. OLYMPUS AMERICAN, INC. ET AL*, Case Number 1:17-CV-03081-MLB; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (82 Pages) is a true and accurate record of the proceedings.

This the 13th day of June, 2018.

/s/ Jana B. Colter, FAPR, RMR, CRR, CRC  
Official Court Reporter